No. 7297

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

HERBERT E. FREY,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

Appellant's statement in the case is neither complete nor fair. Walter E. Frey, Herbert Frey and Selma Steventon were brothers and sister, and John Steventon is the son of Selma Steventon. They together constituted, for all practical purposes, the ownership and management of the San Francisco Milling Company, a corporation. Between the corporation and the individuals they had been carrying $55,000.00 insurance on the life of Walter E. Frey and a similar amount on the life of Herbert Frey. Lester A. Steinfeld, who had been connected with the defendant for twenty years, had his office with the defendant in San Francisco and used the title of City Manager of the defendant company, had been acquainted with Walter

Frey and Herbert Frey for ten years. He knew of the life insurance they were carrying. He solicited them to cancel the policies that they then had and to let him write a cheaper insurance in a similar amount in his (defendant) company. "The deal was to take some less expensive insurance to replace insurance that was more costly." (Tr. p. 71.) As a result of his persuasion and solicitation he obtained the business. Exactly what he planned to do appears in a memorandum in his own handwriting introduced in evidence as plaintiff's Exhibit 5 and which reads as follows:

> "Have Equitable Life Insurance policy and Travelers made over into two separate policies on each life. Herbert's policy to be cancelled and replaced with Mutual Life term insurance. Walter's policy to be taken over by Herbert Frey and Selma Steventon to replace Equitable Life Insurance Society's policies." (Tr. p. 73.) (Pltf's. Ex. 5, Tr. p. 175.)

On March 4, 1932, Steinfeld had Walter E. Frey sign an application for insurance in defendant company. The amount of the application is exactly $55,000.00. (Tr. p. 64.) Walter Frey was then forty years of age. The application shows upon its face that the only insurance then outstanding on the insured's life was $55,000.00 with the Equitable Life Assurance Society. (Tr. p. 64.) The request was that $35,000.00 of the insurance be made to the San Francisco Milling Company and $10,000.00 each to Herbert Frey and Selma Steventon.

Appellant makes no claim of fraud or concealment.

On the 5th day of March, 1932, Walter Frey was examined by Dr. H. W. Allen, the medical examiner of defendant company. Dr. Allen's report of his examination is in evidence, and he was called by plaintiff and testified as a witness. The report and the examination were in all respects favorable and the insurance was recommended. About March 8, 1932, the company sent two policies for $10,000.00 each, payable to Herbert Frey and Selma Steventon, respectively, to Steinfeld. The policies were not delivered, however, because "a question arose because Walter Frey very frankly said that he wanted us to know that he intended to make an aviation flight with his superintendent in a private plane." (Tr. p. 72.) The two policies without delivery were returned to the company. Then Steinfeld persuaded Walter Frey to agree, and sign a statement to the effect (dictated by Steinfeld), that he would confine his flying to regular commercial air-lines with licensed pilots, between definitely established airports. (Tr. p. 72.) This was acceptable to the company and about April 8, 1932, two new policies with aviation riders annexed were sent out from New York. The policies were first received by Mr. Gerald W. Murray, the San Francisco cashier of defendant, and by him turned over to Steinfeld. These were the two policies upon which the jury found in favor of the plaintiff. It will be noted that they are dated March 8, 1932, and annual premiums are due on March 8th of each year. (Tr. p. 148.)

When the cashier gave Steinfeld the policies, Steinfeld gave the company his personal check for the

amount of the first year's premium, less his commission of forty per cent (40%). In addition to receiving the policies, which expressly acknowledged receipt and payment of the first year's premium upon their face, Steinfeld received a separate receipt for the payment of the premium in full. (Tr. p. 72.) He immediately brought the policies and the receipt, enclosed in customary policy envelopes, out to the San Francisco Milling Company and delivered the policies and the receipt to Selma Steventon and Herbert Frey, the beneficiaries, with the following words, from his own testimony:

> "Here you are, here are your policies, here is a receipt from the company, I paid the money, I didn't take any chances that the company might recall the policies on me, I have taken it upon myself to pay the premiums, here they are." (Tr. pp. 72-73.)

With further reference to the absolute delivery of the policies to the beneficiaries, Mr. Steinfeld further testified that there was no reason to take and he did not take a regular and customary form of receipt furnished by the company where policies are left for inspection only and are not to be in effect although placed in the possession of the beneficiary. (Tr. pp. 96, 97.)

> "Q. You delivered the policies and paid the premium; you must have thought they were effective then?
>
> A. Absolutely.
>
> * * * * * * *
>
> We have a form of receipt, which was furnished by our company, where a policy is left for in-

spection only. That means when there has been no settlement. If you take out a million dollars worth of life insurance you would not get a receipt for the first premium, the policy is the receipt for the first premium; for every subsequent premium you get a regular company receipt.

Q. I mean a receipt for the policy.

A. Where a policy is left with an applicant and he has not made any settlement on that, the company wants to be protected. It is supposed then that that policy should be left with the applicant with the receipt signed, 'I hereby receive this policy and it is understood that no obligation is incurred by the company while this policy is in my possession until I pay the premium on same.'

Q. That yellow slip is to that effect, is it?

A. No, it has nothing to do with that at all. *Inasmuch as I had already paid the premium to the company on these policies, I had no hesitancy in giving them the policies. There was not any receipt for elimination of liability on the part of the company.*" (Tr. pp. 96-97.)

The policies were delivered to the beneficiaries, and on April 16, 1932, Steinfeld wrote Herbert Frey a letter (Pltf's. Exhibit 6, Tr. p. 177) in which he said:

> "As you know, you have a receipt from the company for the full first year's premiums on these policies and I trust you will be able to secure for me the company's note for the total amount, so that we may then proceed to get some more insurance issued."

Mrs. Steventon placed the policies in the safe. They remained in the safe over a month. (Tr. pp. 103, 38.)

No letter was written; no request was made for their return. Then the following occurred, according to the testimony of Mrs. Steventon:

> "Then one day I received a telephone call from Mr. Steinfeld. He first asked for my brother Herbert. He was in Los Angeles at the time. Then he asked for my son, John Steventon, but John was away. So then he spoke to me. He said, 'Mrs. Steventon, will you do me a favor?' I said, 'Yes, what is it?' He said, 'Return those policies, I must have those policies for auditing purposes only, I will return them.' I said, 'I have no one to send them with.' He said, 'Can't you get someone, I must have those policies.' It was a Saturday morning, I think, and we were quite busy. I said, 'All right, Mr. Steinfeld, I will do the best I can.' I asked Mr. Straight to take the policies up to Mr. Steinfeld, he wants them for auditing purposes only. He said, 'All right, I will do that.' So I gave them to Mr. Straight and he took them to Mr. Steinfeld." (Tr. pp. 38-39.)

At this point it must be stated that appellant seeks to give this court an entirely erroneous and distorted version of the testimony. On page three of its brief it is stated, as if it were the uncontradicted testimony, that Steinfeld, when he telephoned to Mrs. Steventon, asked her "either to return the policies or pay the premium, as the company's auditor would be in and he must have either the premiun or the policies." The suggestion is then given that Mrs. Steventon returned the policies for cancellation. Not only did Mrs. Steventon testify to the conversation that actually

occurred on her examination in chief, but expressly denied in rebuttal that Steinfeld had said anything about wanting the policies or the money. (Tr. p. 104.)

Mr. John Steventon testified as follows:

> "About the 24th or 25th of May, 1932, I came back and my mother, Mrs. Steventon (the preceding witness), told me she had given up the policies to Mr. Steinfeld. I had several telephone conversations with Mr. Steinfeld in which I asked him why he had taken the policies from our organization without an O. K. from Mr. Frey or myself. He stated that he had taken them for auditing purposes and for me not to worry, we were covered with insurance, and he would have the policies back to us in a short time." (Tr. p. 40.)

But Steinfeld had an application for $55,000.00 insurance and the company had written but twenty. For some reason the company did not wish to write the policy for $35,000.00 payable to the corporation, San Francisco Milling Company. Steinfeld, however, "told Herbert Frey, Walter Frey and Selma Steventon that we could accomplish the same thing by having policies issued to individuals and assigned to the company." (Tr. p. 72.) Walter had his first physical examination on March 5, 1932, and more than sixty days having expired, a new physical examination was required for the issuance of additional policies. So, at Steinfeld's request, on the first day of June, 1932, Walter went up to Dr. Allen for a second examination. He passed this examination, a certificate of good health was issued, and the issuance of the

additional policies was recommended. These policies were sent out from New York dated June 1, 1932, and arrived June 4, 1932. Walter died on the morning of June 4, 1932. Fully advised of the fact of death, Steinfeld delivered these policies to the beneficiaries. He did this, he testified, because he had promised that these policies would be in effect from June 1, 1932, and it was carrying out what was intended and what he had promised. "I had promised Herbert that I would pay the money for the premium into the company, but I didn't do it. (Tr. p. 70.) I promised Herbert that before sundown of the very day Walter came up for this examination the insurance would be put in force." (Tr. p. 74.) It is unnecessary to say more regarding these policies, inasmuch as the jury found thereon in favor of the defendant and the plaintiff has not appealed.

Appellant states that no demand was made for the return of the policies. This is not true. The policies were taken from Mrs. Steventon on or about May 24, 1932. (Tr. p. 104.) John Steventon testified that he was after Steinfeld daily for the return of the policies and was assured that the policies were in effect and would be returned shortly. (Tr. p. 40.) Walter Frey died on June 4th.

Appellant states that the policies were "cancelled." There is no plea of cancellation or rescission. The only defense is that the policies were never effective.

It is very remarkable indeed that the defendant, so careful to require a receipt expressly negativing responsibility before a policy, not in effect, should go

into the hands of the insured or beneficiary, even for purposes of inspection, should permit these policies to remain in the possession of the plaintiffs over five weeks, from prior to April 15th to May 24th, without a receipt of any kind, without a single written communication or notification demanding their return or declaring the company's non-responsibility thereon. Particularly is this true, inasmuch as the company knew not only that the policy itself expressly acknowledged receipt of the premium, but that an additional receipt for the premium had been issued.

Steinfeld testified he gave defendant his checks dated *April 11,* 1932, for the net premium. He testified that he stopped payment on these checks, "two, three or four days" (Tr. p. 73) *after* he delivered the policies. The company had given Steinfeld a receipt in full on receipt of the checks. On *April 16,* 1932, *five days after* the date of the checks and *two days after* these checks in evidence (Tr. p. 200) had been returned from the bank (Tr. p. 73), Steinfeld wrote plaintiff's Exhibit 6, in which he stated to Herbert Frey:

> "As you know, you have a receipt from the company for the full first year's premiums on these policies and I trust you will be able to secure for me the company's note for the total amount, so that we may then proceed to get some more insurance issued."

It is utterly impossible that Steinfeld could have written the letter of April 16th and not have regarded the premium as paid. He testified that it was paid. (Tr. p. 99.) Where is there any letter or noti-

fication whatsoever from Steinfeld or the company notifying insured or beneficiaries that payment of the premium had been stopped or nullified? Where is there any demand for the return of the policies or the receipt? Just what transpired between Steinfeld, the agent, and the company is not clear, but certain it is that either the company received Steinfeld's money or accepted his credit.

Mr. Murray, cashier for defendant in San Francisco, testified:

> "When the company delivers policies to an agent, he is not personally charged with the premium, but it looks to the agent for payment. The company has nothing to do with the collection of the initial premium. We look to the agent. The company holds him personally responsible." (Tr. p. 78.)

Steinfeld testified he delivered the policies, relying upon the responsibility of the beneficiaries to reimburse him. (Pltf's. Ex. 6, Tr. p. 102.) Such practice is customary. (Tr. p. 71.)

Appellant made a motion for a new trial, on the same grounds that are urged on this appeal, and the trial judge denied the motion.

Appellant in its brief makes three contentions:

(1) That the evidence does not support the finding that the premium was paid, and

(2) That there was no meeting of minds, delivery or acceptance of the policies.

(3) That the evidence does not support the finding that the premium was paid "during the insured's continuance in good health."

We shall proceed to consider those contentions in the above order.

I. THE PAYMENT OF THE PREMIUM IS CONCLUSIVELY PROVED BY THE EVIDENCE IN THIS CASE.

There are several answers to appellant's contention, that the policies did not take effect because the premium was not paid.

A. THE PREMIUMS WERE ACTUALLY PAID.

When the company accepted Steinfeld's checks, it accepted them as payment. It evidenced this acceptance both by delivery of the policies and by an independent receipt in full. The policies and the receipt were given to Steinfeld for the very purpose of delivering them to the insured or beneficiaries. The receipt was not for the net amount paid by Steinfeld but for the full amount of the first year's premium. Steinfeld testified over and over again that he paid the premium, that the policies were in full effect and that payment of his checks was only stopped several days after he had actually delivered the policies to the beneficiaries. Steinfeld testified as follows:

> "I gave the defendant my personal check for the premium on the two policies which are payable to Herbert E. Frey and Selma Steventon. I gave a check for the sixty per cent. I received a receipt in full. I brought the policies and the receipt to the San Francisco Milling Company and gave the policies and the fully paid receipt to Selma Steventon and Herbert Frey, the beneficiaries, with the words 'Here you are, here are your policies, here is a receipt from the company,

I paid the money, I didn't take any chances that the company might recall the policies on me, I have taken it upon myself to pay the premiums, here they are'." (Tr. pp. 72-73.)

* * * * * * *

"I handed them the policies folded up and in envelopes just as they were handed to me at the cashier's desk when I paid the premium." (Tr. p. 73.)

"Q. You delivered the policies and paid the premium; you must have thought they were effective then.

A. Absolutely.

Q. You wanted to find out whether they had come to any conclusion as to the payment?

A. Yes, giving me my compensation. If I had died while that money was in the hands of the company I would have had no recourse against the San Francisco Milling Company, or my estate would not, I didn't have a scrap of paper from them. That is all I was after that day.

Q. What was the amount of those checks?

A. The checks I gave the company in connection with the Walter Frey policy was about $186; I paid the company 60 per cent of the net premium." (Tr. p. 96.)

* * * * * * *

"On April 16, 1932, I wrote a letter. I stated in that letter that the policies are in full force and effect, and that they had the policies fully paid, because I had paid for them." (Tr. p. 99.)

* * * * * * *

"Q. When you gave the insurance company the policies were paid, were they not,—the premium was paid?

A. I paid the money to the company." (Tr. p. 100.)

That which was not paid was the amount owing by appellee to Steinfeld and for which credit had been extended in accordance with the agreement of the parties. When Steinfeld talked to plaintiff he was not attempting to secure payment on behalf of the company. As he said:

> "I was down there to put myself in a better position than I was in. A check or a note would do it. A note was perfectly good from the San Francisco Milling Company." (Tr. pp. 101-102.)

From the circumstances and testimony in this case the jury was amply justified in finding that the checks constituted payment. The intent to accept them as such was evidenced by delivery of the policies with the acknowledgment of payment therein, by the separate receipt in full and corroborated by the testimony of Steinfeld.

> "It is a question for the trier of facts in every case whether a note given for the amount of a debt was accepted as payment, and upon appeal the verdict of the jury or the finding of the trial court is conclusive of this issue."
>
> 20 *Cal. Juris.*, p. 928.

In *Martin v. New York Life Ins. Co.*, 3 N. M. 400, 234 Pac. 673, the court held at page 676:

> "And the fact that the insurer, upon receipt of the personal check of the insured, issues and delivers its official receipt, by which it declares in writing that the premium such check is ten-

> dered in payment of has been actually paid, so strongly indicates that it did receive such check as payment, that the burden would rest upon it to show otherwise. Such a rule necessarily arises from its written admissions contained in the receipt."

Obviously, if the issuance of a receipt, by an insurance company accepting a check, throws the burden of proof that it was not accepted as payment upon the insurer there is ample evidence to sustain the jury's verdict in this case. Not alone is that burden not sustained but there is no evidence in the record other than that the check was received in payment.

The initial premium is deemed to be paid whenever the net amount due the company after deduction of the agent's commission is paid. Thus in *New York Life Ins. Co. v. McCreery,* 60 F. (2d) 355, there was a provision requiring that the first premium be paid in cash and that the applicant receive a receipt and sign a certain declaration. The insured did not pay the premium in cash but gave the soliciting agent two promissory notes both in full amount of the premium. It is not disclosed what happened to the first note but the second note was discounted by the agent for some sum greater than the amount which the insurance company was entitled to receive from the soliciting agent, but less than the full amount of the premium. The declaration to be signed by the applicant was never signed and this provision of the application was accordingly not fulfilled. The questions on the appeal were stated by the court to be "(1)

Was the premium paid to the agent in cash; (2) were the requirements for the issuance of a receipt by the agent and the signing of a declaration by the applicant in the nature of conditions precedent to a contract of immediate insurance; and (3) if so, could the soliciting agent waive these conditions?" Appellant apparently cites this case for the proposition that under these circumstances no payment was made which would put the policy immediately in force. (Appellant's Brief, p. 26.) To the contrary, the court expressly held that when the agent discounted the note and secured an amount *equal to the amount the company was entitled to receive* this was payment *in cash* of the premium. The judgment for plaintiff was reversed on the entirely different ground that the failure to sign the declaration required by the application was the breach of a condition precedent which prevented the insurance going into effect.

See, also, *Courdway v. Peoples Mutual Life Ins. Co.,* 118 Cal. App. 530; 5 P. (2d) 453, holding that where the full net premium to the company is paid by the agent there is no question of payment as between the insurer and the insured.

Furthermore, the jury was particularly justified in finding that the checks constituted payment as to the plaintiff and his assignors. In fact, the company would probably be estopped as against the plaintiff in this action to claim otherwise. The receipt in full, together with the policies, was delivered to the agent with the knowledge and intent that it should be by him transferred and delivered to the benefi-

ciaries as evidence of payment and be regarded and acted upon by them as such. It placed in the possession of the agent the means of giving the beneficiaries positive assurance that the premium had been paid. The particular modes and methods of payment as between the company and its agent were unknown to the beneficiaries and did not concern them. The company may have been indebted to the agent, it may have extended credit to the agent, it may have received money or value of any kind satisfactory to itself. As a matter of fact, all that Steinfeld told the beneficiaries was that he had himself paid the premium. Whatever rights the company might have had against its agent, from whom it accepted the checks, it is estopped as against the beneficiaries, those for whose very benefit and satisfaction the receipt was uttered, to contend that it did not constitute payment.

Most certainly the insured and beneficiaries were entitled to rely upon the company's receipt, given in full for their benefit, as conclusive evidence of payment, particularly when accompanied by the express declaration of the agent to that effect. They did rely upon the receipt and as to them the matter of payment was reduced to a satisfactory arrangement between Steinfeld and themselves. The situation would not have been different if the treasurer of defendant had stood by and said: "Don't worry; you are protected; the premium has been paid." As between Steinfeld and the company, the question of whether or not acceptance of the checks constituted payment was one of intent, but as against the plaintiff in this action, the company is estopped to dispute that intent.

The insurance company could not lull the insured and beneficiaries into security, and then defeat their claim on the basis of some undisclosed arrangements between the agent and itself. The "agent" in this case was not moreover, an outside agent, but had for twenty years been a part of the company's organization. There is no difference between the receipt in full given for the premium in this case, and the receipt contained in the contract of sale in *American Nat. Bank v. Sommerville,* 191 Cal. 364, 372-373. In that case the court said, "It is an application of the fundamental, equitable, and moral rule that a man may not be permitted to deny the truthfulness of an assurance which he has given to another for the purpose of having it acted upon by the latter, and which the latter has acted upon." See also concurring opinion of Judge Shaw in *Flood v. Petry,* 165 Cal. 309, 318. An equitable estoppel prevents defendant from disproving the fact of payment as against the plaintiff. (*Dolbeer v. Livingston,* 100 Cal. 617; *People v. Armsby Co.,* 111 Cal. 159; *Irrigated Valleys Land Co. v. Altman,* 57 C. A. 413.) The principle is particularly applicable in this case, as it is undisputed that the defendant did nothing whatsoever to place the insured or beneficiaries upon notice that they could not rely upon the receipt, that payment had not been made as indicated, or that the policies would be ineffective without payment.

Not a single notice or demand was ever sent or given. After over five weeks, Steinfeld obtained possession of the policies by trick, but he at no time told the insured or beneficiaries that payment had been

made by checks that had been stopped, or that the receipt was ineffective. Plaintiff and his assignors were permitted to remain in utter ignorance of any facts that would dispute payment in full as indicated by the receipt until after this action was brought. A finding by the jury that the checks constituted payment was not only amply supported by the evidence so as to be binding upon an appellate tribunal, but was in fact the only reasonable, logical and fair conclusion that could be arrived at.

B. THE RECITAL AND ACKNOWLEDGMENT IN THE POLICIES IS CONCLUSIVE.

Each policy contains the following acknowledgment of payment:

> "This policy is issued in consideration of the application and of the payment of the first premium of one hundred fifty-two and 21/100 dollars ($152.21) receipt of which is hereby acknowledged."

Section 2598 of the Civil Code of California is as follows:

> "Evidence of Payment of Premium—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."

Conclusive evidence is defined by Section 1837 of the Code of Civil Procedure of the State of California, as follows:

> "Conclusive or Indisputable. Conclusive or unanswerable evidence is that which the law does

not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

The code section is as definite, pertinent and applicable as can be imagined. While appellant recognizes the fact that the section is binding on federal and state courts alike, and merely seeks to avoid its applicability to the present case by arguments that are neither sound nor clear, we will refer briefly to the authorities compelling this result.

Where a state legislature has by statute modified the principles of general commercial law, the federal courts will recognize such modification and to the extent that such legislation modifies the law merchant the federal courts will follow the highest court of the state in its interpretation of such modified legislation. (*Peterson v. Metropolitan Life Ins. Co.,* 19 F. (2d) 74; *Smith v. Nelson Land and Cattle Co.,* 212 Fed. 56.)

A party cannot be deprived of a statutory right to which he is entitled in an action in a state court upon removing the action to a federal court. (*Texas & Pacific Ry. v. Humble,* 181 U. S. 57; 21 S. Ct. 526; *Great Southern Life Ins. Co. v. Burwell,* 12 F. (2d) 244.) This is particularly true where the statute prescribes a rule of evidence as in the present case. It will be noted that Section 2598 of the Civil Code is a provision for what shall be deemed to be conclusive evidence of payment of the premium. Under such circumstances federal courts are bound to apply the statute even though it might result in a different

effect than if the common law rule were applied. In *Pure Oil Pipe Line Co. v. Ross,* 51 F. (2d) 925, the court said:

> "It is well settled that section 725, supra, requires the national courts in the trial of civil cases at common law to observe as rules of decision when not within the exceptions named, the rules of evidence prescribed by the statutes of the states in which such national courts are held. Connecticut M. Life I. Co. v. Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; Turner Simplicity Mfg. Co. v. Brenner (C. C. A. 8), 40 F. (2d) 368, 370; and cases cited in note 81, sec. 725, Title 28, U. S. C. A."

See also:

Standard Oil Co. v. Cates, 28 F. (2d) 718;

Franklin Sugar Refining Co. v. Luray, 6 F. (2d) 218,

and the recent decision of this honorable court in

New York Life Ins. Co. v. Gist, 63 F. (2d) 732,

relating to this particular code section.

These policies were delivered into the possession of the beneficiaries. If there could be such a thing as a conditional delivery, such was not intended in this instance. The policies were delivered and received as effective instruments. They were retained by the beneficiaries until taken from them under circumstances by which their possession and rights cannot be prejudiced. The proof of the contents by copies from files of appellant, was the equivalent of the production and introduction of the originals by the respondent.

In the face of this provision in the policies it does not lie in the mouth of appellant to dispute that the policies are binding upon it, because it did not receive the premium. The code section is so plain as not to be open to construction. The cases do not construe it; they apply it. The facts and circumstances may vary, but the acknowledgment of receipt of the premium in the delivered policy is in itself conclusive of its payment, in so far as to make the policy effective.

Appellant asserts that it never has been held in California that such an admission in the policy prevails over an unperformed condition precedent. It is so obvious from the language of the statute that it applies to conditions precedent that appellant's contention has probably never been made in the cases. Whether or not the clauses in some of the cases were in the nature of a condition precedent or not is not clear as they are rarely set out. The courts of the State of California have uniformly applied Section 2598 to every case in which the rights of the policy holders are attacked on the claim that the premium was not in fact paid where there is an acknowledgment of receipt in the policy. The assumption that the section applies to conditions precedent is apparent in the case of *Palmer v. Continental Insurance Co.*, 132 Cal. 68, and the decision of the lower court in 61 Pac. 784. There a note given in payment of the premium contained an express provision that the insurer should not be liable for any loss or damage that might occur while any note or obligation given for the premium remained unpaid. There was a de-

fault in the payment of the note given as a premium. The lower court held that the code section applied *only* so far as the original binding effect of the policy was concerned, in other words to condition precedents, and did not prevent a forfeiture by reason of the subsequent failure to pay the note. As pointed out by the lower court, the insurer was not claiming that the premium had not been paid but was relying upon the agreement contained in the note given for the premium. The California Supreme Court in reversing the decision of the lower court held:

> "Section 2598 is sufficiently comprehensive to include as many stipulations therein referred to, and as many different forms of such stipulation, as the insurer may express in its policy. By inserting in the section the phrase, 'notwithstanding any stipulation therein', the legislature intended to prevent the insurer in any action upon the policy from disputing its acknowledgment that it had received the payment. The section is not limited to a policy which contains a provision in specific language that it shall not be binding unless the premium has been 'actually paid', but extends to any stipulation which is intended to have that effect."

Certainly if appellant is not attempting to avoid the binding effect of the policy based upon a stipulation that it should not be binding until the premium was actually paid, then its entire argument is meaningless. Appellant's apparent theory is that a stipulation that a policy shall not be binding until the premium is paid is something different than a condition precedent. This contention is not sound. As

was recently said in *Hurt v. New York Life Ins.*, C. C. A. 10th, 51 F. (2d) 936, with reference to a similar provision contained in a policy of insurance and the application therefor:

> "In the law of contracts, a condition precedent may be either a condition which must be performed *before the agreement of the parties shall become a binding contract* (13 C. J. p. 564, #532), or a condition which must be fulfilled before the duty to perform a provision of an existing contract arises. Elson v. Jones, 42 Idaho, 349, 245 P. 95, 96; Lynch v. Stebbins, 127 Me. 203, 142 A. 735; Fox v. Buckingham, 228 Ky. 176, 14 S. W. (2d) 421, 423; Wells v. Smith, 2 Edw. Ch. (N. Y.) 78, 13 C. J. p. 564, #532; Cavanagh v. Iowa Beer Co., 136 Iowa 236, 113 N. W. 856." (Emphasis supplied.)

Thus it is immaterial which form of condition precedent appellant argues that this clause constitutes. If it is contended that it is a condition to be performed before the agreement of the parties shall become a binding contract, it is practically in the language of the code. If it is a condition which must be fulfilled before the duty to perform a provision of an existing contract arises, then it is squarely within the rule of the California Supreme Court decision in *Palmer v. Continental Insurance Co.*, supra. The following cases which have been referred to by appellant apply the statutory provision to various situations in all of which the acknowledgment in the policy was held to be conclusive. (*Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Griffith v. Life Insurance Co.*, 101 Cal. 627; *Masson v. New England M. L. Ins. Co.*,

85 Cal. App. 633; *Courdway v. Peoples Mut. Life Ins. Co.,* 118 Cal. App. 530.) Appellant is unable to cite authority of any California court remotely indicating that Section 2598 does not apply to conditions precedent. Thus the following cases cited by appellant do not consider the question of payment of premium or Section 2598 of the Civil Code or any similar code section.

Sharman v. Continental Ins. Co., 167 Cal. 117;

Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746;

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185.

Obviously none of the California cases dealing with Section 2598 can be used as authority for appellant's contention because each held that Section 2598 was conclusive evidence of payment under the circumstances. Appellant relies wholly upon the recent decision of this honorable court in *New York Life Ins. Co. v. Gist,* supra, in support of its contention that the acknowledgment in the policy does not control, although the question was not there involved and the language of this court is square authority for appellee's position. The question before the court was not whether the recital in the policy was conclusive evidence of its payment *as a delivered policy* but rather *when* the recital became conclusive. The court quite properly held that the acknowledgment of payment did not become conclusive until the delivery of the policy which occurred subsequent to the time at which another provision of the policy had been breached. The condition precedent which was there

held to bar recovery was the condition that the insurance should not take effect if the insured had consulted or been treated by a physician between the time of the application and the delivery of the policy. This court merely held against a contention that the policy was constructively delivered prior to the violation by the insured of the above provision. With reference to Section 2598, it was held that the statute entered into the contract and was evidently "directed to the situation where the premium is taken care of by a note or some other credit arrangement, so that the premium has not been paid in the literal sense, since the company has not received the money therefor." This is precisely the situation disclosed by the evidence in this case.

We consider that our preceding argument demonstrated conclusively that the premium was in fact paid to the appellant prior to the delivery of the policies. Certainly it cannot be questioned that the policies were delivered to the beneficiaries and accepted by them upon the assurance that the premium had been paid, as evidenced both by the receipt in the policies and the separate receipt issued. They were accepted and retained by the beneficiaries under a credit arrangement with the agent, which is precisely the circumstance under which this honorable court stated in the *Gist* case that:

> "This statute prevents the insurance company from taking advantage of the provision in the policy that it shall not become effective until the premium is actually paid, as has sometimes been attempted in such cases."

C. COMPANY BOUND BY ACCEPTING RESPONSIBILITY OF AGENT.

It is the established law that where an agent is held responsible if he delivers a policy without receiving the premium and he delivers the policy and trusts to the insured, the company will be bound. The very cases cited by appellant for the theory that the agent cannot waive this provision of the policy recognize this rule and carefully distinguish the case presented from the situation where an agent is held responsible.

Thus in *Curtis v. Prudential Ins. Co. of America,* 55 F. (2d) 97, the court stated:

> "There is no evidence whatever that the officials of the company had any notice that the local agent was collecting weekly installments from the insured, or that the agent remitted same or any part thereof to the company. Had there been any such evidence, and had the company had notice of the situation as it actually was, an entirely different case would be presented for our consideration."

Here the company did know that the agent had given his personal check for the net amount of the premium to the company and that that check had been accepted in payment of the premium and the policy was actually delivered to the insured.

In *Aetna Life Ins. Co. v. Johnson,* 13 F. (2d) 824, the policy required actual payment of the first premium. The soliciting agent of the insurance company delivered the policy under an oral arrangement for the payment of the premium to him. The court held that the payment of the first premium was a

condition precedent to the policy going into effect. The decision of the court shows clearly, however, that on the evidence here presented the court would have found that the agent was authorized to accept this form of payment of the policy, that is, by an oral extension of credit on the part of the agent to the insured. The court recognized in line with the cases of *Miller v. Life Insurance Co.,* 12 Wall. 285, 20 L. Ed. 398; *Smith v. Provident Sav. Life Assur. Soc.,* 76 F. 765, 13 C. C. A. 284, and *Fidelity and Casualty Co. v. Willey,* 80 F. 497, 25 C. C. A. 593, that if the insurer held the agent responsible for the premiums and charged the amount of this particular premium to his account this practice would authorize the agent to deliver the policy. The court stated as follows:

> "We are unable to find in the agency contract in this case with Blewett & Severn, or in the instructions given them by the insurer, any grant of authority to extend credit for the amount of first premiums received. There is no evidence of any practice by the agents of the insurer to give such credit. Nor do we find that the insurer charged to the agents the amount of premiums on policies sent to them for delivery, or held them personally responsible for the premiums. By the terms of the contract between the manager and Blewett & Severn, the agents were to be credited with every application for new insurance, and were responsible to the manager for all policies and papers delivered to them, and agreed to hold all money collected for premiums as a trust fund. No evidence was given to show the state of accounts between Blewett & Severn

> and the company, or the manager, or to show that premiums were charged to agents when policies were forwarded for delivery, or at any other time."

The custom of the appellant in this case is shown by the following testimony of Gerald W. Murray, its agency cashier.

> "When the company delivers policies to an agent, he is not personally charged with the premium, but it looks to the agent for the payment. The company has nothing to do with the collection of the initial premium. We look to the agent. The company holds him personally responsible." (Tr. p. 78.)

That credit was extended to the agent on these particular policies is shown conclusively by the fact that the company took the agent's checks in payment of the policies. The mere fact that the agent subsequently stopped payment on the check cannot affect this extension of credit.

In *Smith v. Provident Sav. Life Assur. Soc. of New York,* 65 Fed. 765 (C. C. A. 6th Cir.), the court said:

> "The provision in the contract of agency between a life insurance company and a general agent that 'agents crediting * * * premiums not actually received do so at their own risk, and must look to the policy holder for reimbursement. The society does not ask or desire you to take this risk,'—is evidence that the company was aware of the practice of its agents to give credit, and, in connection with evidence of the agent's practice of giving credit on the first premium,

shows a greater actual authority than is implied from the provision of the policy that it shall not take effect unless the premium is actually paid, so that a delivery by the agent of a policy without receiving payment would constitute a waiver of any such provision. * * *

In view of the provision in a contract of agency with a life insurance company that agents crediting premiums not actually received do so at their own risk, a provision expressly withholding from the agent authority to give credit will be interpreted to mean credit for the company."

II. CONTENTION THAT THERE WAS NO MEETING OF MINDS; NOR WAS THERE DELIVERY OR ACCEPTANCE OF THE POLICIES.

Under this heading appellant gives a few fragmentary and segregated excerpts from the record that do not give an accurate picture. Without burdening the court with repetition, appellee's statement of facts will disclose the true situation. In the absence of evidence to the contrary, the intention of the agent to make delivery will be presumed from manual tradition. *Smith v. Provident Mutual Life Assurance Society,* 65 Fed. 771.

Appellant argues that the policies did not go into effect because Walter Frey had not signed "slips" sent out by the assistant secretary and registrar of defendant and addressed to the "Manager of the San Francisco Office" and which requested that the policies be not delivered or premium accepted until an appended form of acceptance had been signed by the

insured. These slips were frequently referred to during the trial as "yellow slips."

There is absolutely nothing in the policy or application making the execution of any such receipt a condition to the policy becoming effective. There is absolutely nothing to place the insured or beneficiaries upon notice that any such receipt would be requisite.

> "In sending a policy to an agent in this state for delivery with instructions as to what to require, the instructions will not be binding upon the beneficiary in the policy unless the beneficiary or the insured had knowledge of the conditions contained in the instructions to the agent."
>
> *Mutual Life Insurance Company v. Vaughan,* 125 Miss. 369, 88 Southern 11.

The very idea that disregard by an agent of such an inter-office communication could nullify a policy which had been delivered is absurd upon its face. Regarding these slips, Steinfeld testified:

> "On April 16, 1932, I wrote a letter. I stated in that letter that the policies are in full force and effect, and that they had the policies fully paid, because I had paid for them. * * * They were paid for. That portion of the transaction which was not completed was the signing of that exhibit, whatever the number is. Whether that is a legal point, or whether the insurance is in force, I am not a lawyer and I cannot say. The yellow slip is an instruction to the agent.
>
> Q. Look at it and see if it is not addressed to the manager. Were you the manager of the company?
>
> A. No, I was not.

Q. Then it was not addressed to you at all, it was addressed to the manager of the company, wasn't it?

A. That is correct; that is what it says there, yes." (Tr. pp. 99-100.)

The testimony is undisputed that the "slips" were never called to the attention of the insured or beneficiaries. They neither saw them nor were they asked to sign them. (Tr. p. 104.) Steinfeld testified:

> "I positively do not remember whether I did or did not ask them to sign any such paper as Exhibit J; but the chances are I called their attention to the fact. I have a recollection that I called their attention to them. If I didn't I would have lost my job. They were very immaterial, these papers. The most important was the checks. I handed them the policies folded up and in envelopes just as they were handed to me at the cashier's desk when I paid the premium." (Tr. p. 73.)

It would, indeed, be a sham and a fraud if the law were as Mr. Murray, defendant's cashier, would construe it:

> "Q. Do you mean to say that if the company received its premium and retains its premium and the insured receives the policy and retains the policy that that policy is not in effect unless the insured has signed the yellow slip?
>
> A. Yes." (Tr. p. 79.)

As a matter of fact, the testimony is almost conclusive that there were no such slips delivered with these policies. There is no testimony that slips, of

which Exhibit "J" is a sample, were delivered with the policy. The testimony of defendant's witness Gerald W. Murray was that the "originals" of defendant's Exhibit "J" accompanied *these* policies when they were given to Mr. Steinfeld. This was on direct examination and from the evidence it was clear that Mr. Murray was under the impression that defendant's Exhibit "J" pertained to the policies delivered. On cross-examination it developed through this same witness' testimony that defendant's Exhibit "J" had reference to an earlier set of policies which were returned to the company. (Tr. p. 78.) Whatever claim appellant might make as to the necessity of signing a proper form similar to Exhibit "J" *pertaining to the policies delivered* it certainly cannot contend that before the policies should take effect the insured should acknowledge his acceptance of some *other* policies which were *not* delivered to him and were not intended by anyone to be in effect.

Appellant refers to a colloquy between the court and Steinfeld. If appellant seeks to intimate that the court was impressed by the "colloquy", it fails, for motions for directed verdict and new trial were alike denied. Appellant repeats at this point that no request was made for the return of the policies after they were taken by Steinfeld. Mr. Steventon testified that he was daily, during the brief interval that elapsed between the date the policies were retaken and the death of Walter Frey (May 24-June 4), after Steinfeld to return the policies and was given the assurance: "That the policies were in effect, that

they were covered, not to worry and that they would be returned shortly."

Appellant argues that the first policies were "surrendered" and that those issued under date of June 1, 1932, were substitutes. Appellant failed to impress either court or jury with this theory. It should be mentioned, moreover, that there is no defense of surrender or cancellation—the only defense is that the policies never went into effect. It should also be mentioned that if appellant's theory were correct, that the policies of June 1, 1932, were substitutes for those of March 4, 1932, appellant has no complaint to make for either the earlier or the later would have been in effect and the jury only found for the plaintiff for $20,000.00. It should also be noted that when the company sent out the policies with the aviation rider annexed and which were to replace the first two policies written, the new policies with the aviation rider were dated March 8, 1932, the same date as the policies they replaced. The policies issued after Walter's second examination are dated June 1, 1932. They were not replacement policies, but new policies. The testimony is undisputed that when Steinfeld requested the second physical examination he did not indicate that it had anything to do with the policies issued under date of March 8, 1932. (Tr. p. 40.)

In any event, there can be no question that a substantial part, if not all, of the evidence showed delivery of the policies. Under those circumstances the verdict of the jury is conclusive in this respect.

In *Inter-Southern Life Insurance Co. v. McElroy*, 38 F. (2d) 557, the court said:

"It is earnestly urged on behalf of the defendant that there was never an actual delivery of the policy, but that, as delivered, it was incomplete, and that it was the intention of the parties that it should be returned for correction or amendment. Under the testimony, the details of which we need not relate, the question as to whether or not there was an actual delivery of the policy and an acceptance of it by the insured was a question of fact to be determined by the jury on proper instructions by the court, and the verdict of the jury is conclusive on this question. We must assume that the jury, under the instructions of the court, found that the policy was delivered to and accepted by the insured."

III. DELIVERY OF POLICIES DURING INSURED'S "CONTINUANCE IN GOOD HEALTH".

Appellant's third point is that the evidence does not support the finding that the policies were delivered during the insured's "continuance in good health." Appellant is asking this court to pass upon the weight of the evidence and set aside the implied finding of the jury despite the facts,

first, that the question was submitted to and passed upon by the jury under full and proper instructions (as a matter of fact, the instructions were too favorable to appellant as we shall presently show);

second, that a motion for a directed verdict was made on this ground before the trial judge, who heard the testimony and observed the witnesses, and was denied;

and *third,* that a motion for a new trial was made before the trial judge upon the same ground and was denied.

To indicate how definitely and fully the issue was presented to the jury, we quote the following from the instruction (p. 109):

> "Under the provisions of these policies which are before you, with respect to the condition that none of them shall be effective until and unless the policies respectively be delivered and the premiums paid during the continuance in sound health of (106) Walter E. Frey, you are instructed that such provision is a condition precedent to the taking effect of the policy. The effect of these provisions is to make it a condition that the policy shall not take effect or become valid and binding unless the insured was in fact in sound health at the time the policies were delivered (if you find they were delivered). In this aspect the defendant's objection is not made to depend upon fraud or misrepresentation, but upon the fact as to whether or not the applicant's health was good or otherwise. The inquiry then becomes an inquiry as to that fact, and does not depend upon the applicant's knowledge or belief. In other words, it is not claimed that the deceased or his beneficiaries were guilty of any fraud or misrepresentation. The question in this connection for you to decide is whether the deceased was in good health at the time of the delivery of the policies. He was not in good health on June 4th when the last of these policies were actually delivered, for at that time he was dead. Was it the intention of the parties that the poli-

> cies should be deemed delivered when they were executed and mailed in New York June 1st and was the deceased in good health at that time."

We have stated that the instructions were too favorable to the appellant on the question of delivery of the policies during the insured's "continuance in good health." The general rule of the state courts is that a provision requiring delivery of the policy while the insured is in good health is a relative term requiring only the same condition of health as at the time of application. This is the rule in New York, where the home office of the appellant is located, and in many other jurisdictions. As was said in *Chinery v. Metropolitan Life Ins. Co.,* 182 N. Y. S. 555, with reference to a clause providing that "no obligation is assumed by the company prior to the date hereof nor unless on said date the insured is alive and in sound health":

> "Where a policy contains the provisions referred to and the company has had a medical examination prior to accepting the risk, the provision that the insured must be in sound health upon the date of the policy merely means that he has not become ill between the time of making his application and the time of the issuance of the policy. It 'has no application to such chronic diseases as the insured may have had at the time of his application and medical examination'. Webster v. Columbian Nat. Life Ins. Co., 131 App. Div. 837, at 842, 116 N. Y. Supp. 404, 408."

See also *Mid-Continent Life Ins. Co. v. House,* 10 P. (2d) 718; *Priest v. Kansas City Life Ins. Co.,* 227

Pac. 548; and the cases cited therein; also, 1 *Cooley's Briefs on Insurance,* 2d Edition, page 653.

We concede that where delivery is required to be made while the insured is in good health the federal court rule is contrary to these decisions. The result of this situation is that although mutual life insurance companies are operated for the mutual benefit of policyholders and theoretically the same rights should be given to every policyholder paying the same premium, the actual effect of this difference in the rule is to make the rights of the policyholder in this connection depend upon the availability of the state or federal court for trial of the action. Bearing this in mind, the only inference that can be drawn from the inclusion in this application of the term "continuance in good health" rather than the absolute requirement of good health is that it conforms the result in either the federal or state court by express provision of the contract. In other words, unless the word "continuance" be wholly ignored the meaning of the requirement in this application is simply a statement of the rule of the state courts as set out in the *Chinery* case.

We do not find where such a clause has been construed by the federal courts. It has been passed upon by state courts and the reasoning of those cases is so convincing that we have no doubt it will be accepted by this court. In *Mutual Life Insurance Co. of New York v. Hoffman,* 133 N. E. 405, the court said:

> "The provision that unless the first premium shall have been paid and the policy shall have

been delivered to the applicant during his 'continuance in good health' implies that the applicant was in good health when the application was made. Whether the insurance company issued a policy depended upon the statements contained in the application and in the medical examination, the clause in question has no reference to any unsoundness of health at the time of or previous to the application and medical examination. It refers solely to a change in the condition of health after the making of the application and medical examination, and when it is not shown that the alleged unsoundness of health did not occur between the date of the application and medical examination and the delivery of the policy, the insurance company must rely on the statements in the application and medical statement to avoid a recovery on the policy, and not upon the clause in question."

In *Fidelity Mut. Life Ins. Co. v. Elmore,* 71 So. 305, the court said:

"The phrase 'continued good health' can mean only that the insured having stated that he was in good health when he applied for the insurance, the company would not be bound to deliver the policy, if this state of good health had changed to a state of bad health, even though the application had been approved, the policy signed by the officers of the company and delivered to its agents for delivery to the insured. 'Continued good health' is a relative term and manifestly relates to the insured's statement of his condition when he signed the application. This is the letter of the document prepared by the insurance com-

pany, and its own carefully prepared documents will be construed most strongly against it."

Of course, under the pleadings and evidence in this case there can be no claim made by appellant that the insured's condition of health changed between the date of the application and the date of delivery of the policy since appellant's claim is that the condition which it claims to have proved and which it describes as inconsistent with good health is claimed to have existed prior to the date of the application. However, we will consider the evidence in sufficient detail to show that the insured was in fact in good health at the time the policies were delivered. Before doing so we desire to point out that, to use the language of the court in *Mid-Continent Life Ins. Co. v. House,* supra:

> " ' "The phrase, 'good health,' as used in its common and ordinary sense by a person speaking of his own condition, undoubtedly implies a state of health unimpaired by any serious malady of which the person himself is conscious. He does not mean that he has no latent disease of which he is wholly unconscious. If by the phrase 'good health' an insurance company desires to exclude every disease, though latent and unknown, it must do so by distinct and unmistakable language." ' "

As said by this honorable court in *Northwestern Mut. Life Ins. Co. v. Wiggins,* 15 F. (2d) 646:

> " 'Good health,' 'illness,' and 'disease' must be considered, in an application for insurance, not in the light of scientific technical definitions, but in the light of the insured's understanding in

connection with which the terms are employed in the examination."

Bearing this in mind, we will now review the evidence in order that a true picture of the testimony upon which the jury based its verdict may be presented.

Dr. Herbert W. Allen testified twice, once for plaintiff and once for defendant. He had been a practicing physician for thirty years and in the employ of defendant for over twenty years. He testified to a personal recollection of his examination of Walter Frey. He examined him first on March 4, 1932, and again on June 1, 1932. "I made such an examination on or about March 4, 1932. As far as my examination of Walter E. Frey went, I found no evidence of disease. I found him to be in a normal condition of health and so reported to the defendant. On or about June 1, 1932, I again examined Walter E. Frey in a less extensive manner. I examined his heart and I found nothing abnormal that I could detect, which I reported to defendant."

Dr. Allen further testified that he made a special examination of the heart. He examined the palpable arteries to detect any evidence of sclerosis. He examined the size of the heart. He used three methods for this purpose,—the location of the apex beat, percussion, and the stethoscope. "I applied those three methods in this instance, and according to the examination made, to the best of my ability, I found Walter Frey's heart to be normal. I listened to ascertain

whether there were any murmurs and found no evidence. I took his blood pressure. I do not recall what the figures were. If there was anything abnormal about it, I would have called it to the attention of the defendant."

We then have the examination of appellant's skilled physician at approximately the time the policies were issued, and another examination approximately three months thereafter. Upon both examinations we find the heart to be normal in size, functioning normally, and without evidence of disease. This is certainly evidence of the most persuasive character.

Dr. Adolphus Berger, of the Coroner's office, testified as to the results of his *post mortem* examination. He testified:

> "I determined to my satisfaction the cause of death, which I recorded as acute dilation of the heart, chronic myocarditis, and coronary sclerosis with occlusion, the latter being the immediate cause."

Let us briefly analyze this finding. A coronary occlusion occurs when a clot obstructs the vessel and stops the flow of blood. That is a condition which occurs in most cases of sudden death, and precedes death by a matter of seconds or minutes. Therefore Dr. Berger testified: "I saw no evidence by its closure that it had caused any acute or very immediate disease. I concluded that the individual had died so quickly that no acute disease as the result of the closure of that vessel could have formed." The acute dilation of the heart occurs as a concomitant of death. The

heart relaxes, and does not contract. "It is correct to say that by acute dilatation of the heart I mean that the heart muscle had relaxed so that the heart at the time of death had expanded and did not contract."

Dr. Berger likewise testified that sclerosis "is not pathologically designated as a disease of the heart, but as a gradual, you might say, thickening or hardening of the vessels of the heart, which comes along with years."

> "Q. In other words, what you found was not properly a disease of the heart, but a degeneration, a hardening of the vessels?
> A. That part of it." (Tr. pp. 52-53.)

We have spoken of the coronary occlusion, sclerosis, and the acute dilatation. This leaves but the diagnosis of "chronic myocarditis". Myocarditis, he said, is an inflammation of the myocardium.* Dr. Berger gave his opinion that myocarditis existed, and called it chronic, but did not attempt to testify how long such a condition had existed. Dr. Berger also testified that, in his opinion, the heart was in life an enlarged heart. He did not weigh the heart and had nothing to guide him except his conclusion from the size of the relaxed heart after death. Dr. Berger did not make any microscopic examination of the heart and based his conclusion upon his gross examination.

Appellant contends that because Dr. Berger's examination was a post mortem examination his conclusions must be accepted as a matter of law and the opinions of examining physicians disregarded, and

*Dr. Kaufman fully explained the meaning and mis-use of this term.

without considering its possible distinctions from the present case cites in support of this contention the case of *Scharlach v. Pacific Mutual Life Ins. Co.,* 16 F. (2d) 245. In that case the evidence was undisputed that the insured was a very sick man at the time the policies were delivered. The disease was definite, malignant, pathological, of determinable duration within reasonable limits, and its presence at the time of death was undisputed. It was not a case of the conclusion of an autopsy surgeon from what he saw on gross examination of a heart as to the size and condition of that heart during life, as opposed to the findings of a skilled examining physician at the time the policy was issued. It was not a case of discovery of changes which are normal to age, which are not incompatible with normal functioning and good health, and which are not pathological. The same is true of the case of *Greenbaum v. Columbian Nat. Life Ins. Co.,* 62 F. (2d) 56. To illustrate the distinction and difference, and likewise the nature of sclerosis and myocarditis, we quote from the following cases:

> *Clarke v. New Amsterdam Casualty Co.,* 180 Cal. 76.

In that case the cause of death was given as acute myocarditis.

> "The autopsy revealed a heart of more than normal size. The valves were thickened and covered with a calcereous deposit, which, according to the experts, would account for the murmur noticed just before the operation. * * * Great stress is laid by defendant's counsel upon the

> fact that at the post mortem examination the heart showed lime deposits. One of the defendant's expert witnesses, a physician, testified that 'the lime deposits in the heart were due to arterial sclerosis, which is frequently due to old age'. But there was no showing that this condition was pathological or that it was even unusual in a man of the age of the assured. Naturally a man of sixty or more would have less power to resist evil consequences resulting from an accident than a younger person would possess, but an insurer accepting as premiums money of a client of advanced years may not complain of that fact."

In *Equitable Life Assurance Society v. Gratiot,* 14 Pac. (2d) 438, 82 A. L. R. 1397, the court refers to the testimony in the case as follows:

> "That such hardening (sclerosis) is not a disease, but a condition of the tissues developing gradually over a period of years. (p. 440.) That sclerosis of the arteries is common, and people that have it can live to a ripe old age even with an aneurysm." (p. 441.)

Before leaving the testimony of Dr. Berger, we wish to point out that the ability of an autopsy surgeon to accurately diagnose a condition of the heart from a gross examination of the heart after death is by no means absolute, and bears no analogy to his ability to discover a cancer or ulcer. This cannot better be demonstrated than by citing as an illustration the testimony of an autopsy surgeon from the same Coroner's office given before the same court, Judge Kerrigan presiding, on the 15th day of November,

1933, in the action of *Gussie Rubin v. Maryland Casualty Company,* action No. 19,512-K. The testimony in that case was transcribed and can be made available to this court. In that case Dr. Jesse L. Carr, of the Coroner's office of San Francisco, performed the autopsy. The decedent had met with sudden death, which the plaintiff claimed was the result of an accident, the automobile in which he was riding having gone over an embankment. The insurance company claimed that death was due to a preexisting condition and disease of the heart. Dr. Carr, after performing his autopsy, gave the cause of death as "coronary fibrous myocarditis with myocardial failure". This was Dr. Carr's gross examination. Fortunately, in that case slides were taken for microscopic examination. On the trial of the case Dr. Carr testified that his gross examination was entirely wrong and was proved to be such by the microscopic examination. The following is an extract from the testimony:

"Q. On page 1 of this report (written report of autopsy) which has been identified, you note the cause of death as chronic fibrous myocarditis with myocardial failure.

A. Yes.

Q. And on the same page you note in your histological (microscopic) examination that there is no fibrosis: Is that true?

A. Yes.

Q. Now, I will ask you if the finding of no fibrosis in the heart is not inconsistent with a cause of death of chronic fibrous myocarditis with myocardial failure?

A. Absolutely inconsistent.

largement of the heart by a physical examination. If such were not the fact, a physical examination would be useless.

"It is reasonable to expect that if a patient has a materially enlarged heart, for example one and one-half times normal size, that such a fact would be found by a physical examination, except there be a deformity of the chest wall of such a character that would make a physical examination not an average examination; for example, if the man instead of having the normal curvature of the chest—if he had the normal curvature of the chest then a heart which is one and one-half times the normal size could certainly be found by physical examination; otherwise physical examination would be useless if such a thing as that were not possible." (Tr. p. 89.)

* * * * * * *

"If I were told that a patient was examined by a competent physician on March 4, 1932, and June 1, 1932, and found to have a normal sized heart, my opinion would be that it was normal. That opinion would not be changed by the findings of an autopsy surgeon after death, that the heart was one and one-half times normal size; because I have previously tried to explain to you that at death there is normally a dilatation of the heart as a concomitant of death, and therefore the enlargement of the heart that the autopsy surgeon found would, in the light of the two examinations by a competent physician previously, must therefore be interpreted as the normal dilatation that has occurred in that individual's heart at the time of death." (Tr. p. 90.)

* * * * * * *

> "To the question whether it is possible for an autopsy surgeon finding an acutely dilated heart, to determine what was the size of that heart during life, my answer would be No." (Tr. p. 88.)

Dr. Kaufman thereupon gave in detail the reasons that it is impossible for an autopsy surgeon to determine by inspection after death what the size of the heart was during life. (Tr. pp. 88-89.)

He also testified that absence of murmurs indicated that the heart was not dilated. (Tr. p. 91.)

Regarding the findings of Dr. Berger, Dr. Kaufman further testified:

> "If an autopsy surgeon gave as the cause of death acute dilatation of the heart, chronic myocarditis, and coronary sclerosis, with occlusion, with no infarction present, I would infer the acute dilatation of the heart to be the result of death and not as the result of pre-existing disease; the chronic myocarditis to be the result of the coronary sclerosis. The cause of death would be the acute occlusion of the coronary vessels." (Tr. p. 82.)

Chronic myocarditis, Dr. Kaufman explained, was a general, misleading and meaningless term, misapplied by the medical profession to describe a heart condition in association with a hardening of the arteries, and does not indicate that there was any preceding disease or inflamed condition of the heart muscle.

> "Chronic myocarditis is in essence a misnomer; that is to say, it is a traditional term which has held up until today by reason of an unwilling-

ness on the part of the profession to change it. As a matter of fact, the termination 'itis' represents the Latin termination to indicate an inflammation of; for example, appendicitis, an inflammation of the appendix. Myocarditis does occur, that is, there are conditions in which a true myocarditis occurs. For example, in diptheria, that is a true myocarditis. The term 'myocarditis' is used by the profession in describing a heart condition in association with a hardening of the arteries of the heart is a term which has remained in use although recognized by the profession as not in any way evidencing a preceding inflammation of the heart muscle. * * * All the authorities who write on the subject use the term 'myocarditis' with apologies." (Tr. p. 84.)

In other words, the description "chronic myocarditis" does not indicate that there was any preceding inflamed or diseased condition of the heart muscle.

Regarding sclerosis and myocarditis, Dr. Kaufman further testified:

"Coronary sclerosis is a condition, in the last analysis, of hardening of the coronary arteries of the heart. * * * As an actual fact, from the moment of birth until death there is a progressive deterioration and a series of progressive changes of degeneration which take place in all organs of the body, including the heart and the coronary vessels. From the age of six months on one can find in the arteries of an infant, even, evidence that sclerosis is beginning to occur. As a person lives long enough the sclerosis becomes more marked, until ultimately the sclerosis may develop to such an extent that at autopsy the coro-

nary arteries cannot be cut with a knife, and have to be cut with a scissors, since they are so markedly hardened—they are actually concrete pipes—lime pipes rather than concrete, they are pipes of lime; yet that person may function and the heart may function perfectly normally and allow them to carry on the normal every day occupation without any evidence of disease and yet at autopsy you find these changes. *As a corollary of those changes in the coronary arteries you find corresponding changes which are termed —incorrectly termed—myocarditis—also in proportion to the age of the individual and to the changes which have preceded in the coronary vessels.* The extent of these changes vary in different individuals, and these changes are constantly going on in all individuals, and if an autopsy were performed, irrespective of the cause of death, there would be found to one degree or another a certain amount of what I term coronary sclerosis or myocarditis. With one exception, so as to be accurate in the manner, there are isolated conditions or isolated cases, rather, in which there seems to be a predilection in the site in which these changes occur in the vessel. For example, in some cases the coronary vessels and the aorta may be relatively intact whereas the vessels of the brain may be markedly involved; or the vessels of the extremities may be markedly involved, or the superficial vessels may be markedly involved and yet the rest of the vessels of the body be only involved to a minor degree. Throughout the body changes of this character are constantly taking place to a greater or less degree throughout the whole of one's life."

Then Dr. Kaufman testified that from the findings of the autopsy surgeon the cause of the death in this case was acute occlusion.

> "If an autopsy surgeon gave as the cause of death acute dilatation of the heart, chronic myocarditis, and coronary sclerosis, with occlusion, with no infarction present, I would infer the acute dilatation of the heart to be the result of death and not as the result of pre-existing disease; the chronic myocarditis to be the result of the coronary sclerosis. The cause of death would be the acute occlusion of the coronary vessels." (Tr. p. 82.)

* * * * * * *

> "In my opinion, given the findings of the autopsy surgeon, the cause of death in that case would be acute coronary occlusion; and, unfortunately, *I have seen it happen too often that a man in good health could suddenly die, and the same findings be disclosed on autopsy.*" (Tr. p. 90.)

* * * * * * *

> "If that heart at the time of physical examination were negative with respect to murmurs, then it is good presumptive evidence that the heart at the time of the examination was not dilated, because one of the most important signs of a dilated heart is the evidence of murmurs. If in this particular case no murmurs were found at the time of the two examinations, it would be presumptive evidence against the dilatation existing at those times." (Tr. p. 91.)

Dr. Kaufman testified that the pulse and blood pressure as found by Dr. Allen were normal.

In conjunction with all of the foregoing testimony, Dr. Kaufman was then asked the following questions:

"Q. If I told you, Doctor, that an autopsy surgeon found a heart acutely dilated in all chambers and filled with a dark fluid blood, the heart about one and one-half times its normal size, and there are scattered regions of fibrosis throughout; the coronary vessels of the left side indicate a marked thickening and in the descendens branch about one and one-half inches from its origin there is a complete occlusion by virtue of marked sclerosis of the vessel. There is no acute infarction seen. The coronary vessels of the right side, although thickened to a moderate degree, are in no way comparable to those of the left side. There is some sclerosis at the aortic cusps. The cusps are not flexible. Do these findings necessarily indicate that the person examined was not in good health prior to the time of death?

A. No.

Q. They do not necessarily so indicate?

A. No.

Q. *I will ask you if the findings such as I have read to you and indicated to you are ordinary changes in a heart and vessels found in autopsy upon individuals forty years of age, and over?*

A. *Yes;* we can say that it is a rarity to find a person of forty years or over with coronary vessels that are intact. I think the figures given by Von Monkenberg are to the effect that at least 95 per cent. of persons over the age of 40 have coronary arterial hardening—sclerosis—and die of conditions other than due to coronary arterial occlusion or infarction. It is correct to say that such findings do not necessarily indicate that

> the person examined was not in good health prior to the time of death. *According to my understanding, arteriosclerosis, or myocarditis, or both of these together, do not constitute a disease.*"
> (Tr. pp. 85-86.)

It is clear, from the testimony of Dr. Kaufman, that as to the size of the heart, and as to its normal condition and functioning, he regarded the findings of Dr. Allen as more reliable than the conclusions of Dr. Berger. It is also clear that sclerosis and myocarditis do not constitute disease, but conditions normally to be found to a greater or less degree in individuals 40 years of age or over. It is also clear that such conditions, although found to be present upon autopsy, do not prevent the enjoyment of good health. The real cause of death, in Dr. Kaufman's opinion, was coronary occlusion, which was so recent as to leave no evidence of infarct.

Appellant segregates the one question in which the autopsy findings were quoted verbatim to Dr. Kaufman, and endeavors to dispose of his entire testimony on the ground that the word "necessarily" was used. Unfortunately for appellant, the testimony of the doctor cannot be brushed aside so lightly. Taking the question by itself, and eliminating all of the other testimony of the doctor, if the autopsy findings did not necessarily indicate that the person examined was not in good health prior to the time of death, then the jury was justified in believing, in accordance with the findings of Dr. Allen, that he was in good health prior to that time. But that question and answer do

not stand alone; they were followed up and combined with other questions, answers and testimony, which appellant would disregard, and in which Dr. Kaufman definitely and positively disposed of Dr. Berger's testimony and gave his conclusion, confirming the findings of Dr. Allen, that Walter Frey was in good health at the time of his examination.

Dr. Moody's testimony is merely to the effect that it is possible for an examining physician not to discover a true heart condition. This is true as well as it is true that an autopsy surgeon may be mistaken as to the true heart condition and particularly as to his conclusions regarding past history and duration.

Certainly this court is not going to say that the jury and the trial judge, who saw and heard the witnesses, did not have substantial evidence to support their conclusions.

Commencing at page 66 of its brief, appellant cites a line of authority upon which it apparently relies to convince this court that the testimony of Dr. Kaufman must, as a matter of law, be entirely rejected and the opinion of its own witnesses be deemed conclusive. These authorities may be grouped into two classes. First, those which emphasize the necessity of caution in accepting the testimony of a paid expert witness and, second, those which recognize that where the existence of a fact is being testified to the evidence of one who has witnessed the fact is to be preferred to that of an expert testifying in response to hypothetical questions. In the proper case these general rules of law are no doubt entitled to consid-

eration. They have no applicability to the present case, as we have previously pointed this out in our consideration of the case of *Scharlach v. Pacific Mut. Life Ins. Co.,* supra. The law with reference to this question of heart disease is well illustrated in the case of *Linn v. Terrell Compress & Warehouse Co.,* 142 So. (La.) 193, cited by appellant at page 72 of its brief. This case completely disposes of appellant's contention. There, as here, an autopsy was performed by the coroner who testified that the death was due to chronic myocarditis and acute dilatation. Expert testimony was then adduced on behalf of both parties as to the actual cause of death based upon the findings of the coroner. The testimony of the witness Dr. Duval that in his opinion the deceased died from infarction of the heart was accepted as against both the coroner's conclusion and corroborative testimony of an attendant physician, the court holding that the conclusion of Dr. Duval, who, like Dr. Kaufman, was a heart specialist of great experience, based upon the findings of the coroner, was not inconsistent with those findings and was to be preferred over the testimony of a general practitioner. Here Dr. Berger, who performed the autopsy, testified on behalf of defendant as to certain facts and also as to his conclusions from those facts. Under the rule of the cited case the jury was entitled to accept the conclusions of Dr. Kaufman construing the actual findings of Dr. Berger as against the opinion of either Dr. Berger or the other witnesses testifying on behalf of defendant.

CONCLUSION.

It is respectfully submitted that the contentions of appellant are not well taken; that the premium was actually paid and that appellant is estopped both by law and by fact to contend to the contrary; that the policies were delivered and accepted; and that the implied finding of the jury that the policies were delivered "during the insured's continuance in good health" is fully supported by the evidence.

The judgment should be affirmed.

Dated, San Francisco,
March 12, 1934.

Respectfully submitted,
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